(2)

92-6556

Number _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

KENNETH O. NICHOLS

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI - Criminal Case

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CARTER, MABEE, PARIS & FIELDS

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QUESTIONS PRESENTED FOR REVIEW

I.

The District Court should not have considered his previous uncounseled misdemeanor in computing Defendant's criminal history score.

II.

The Court should not have considered evidence which was illegally seized in a March 4, 1988 search.

III.

The Court should not have given Defendant a two (2) level upward adjustment under 2D1.1(b)(1).

IV.

The Court should not have considered the quantity of drugs discussed in a phone conversation which did not result in a drug transaction. The Court should rather have sentenced Defendant on the basis of the drugs actually involved in the transaction in which appellant participated.

V.

Defendant should have been given a 2 level reduction for acceptance of responsibility under sentencing guideline 3E1.1.

LISTING OF ALL PARTIES

The names of all parties are included in the caption of the case.

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OPINION BELOW

The opinion of the Court of Appeals, recommended for full text publication, appears as Appendix A hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit affirming the judgment of the District Court was entered on the 6th day of November, 1992. A petition to rehear was timely filed. The Petition to rehear was denied by order of the Court dated February 16, 1993. Jurisdiction of this Court is invoked pursuant to Title 28 of the United States Code, Section 1254 providing in pertinent part for granting of review by writ of certiorari upon the petition of a party to a criminal case after rendition of judgment by the United States Court of Appeals. A Motion to Allow Petitioner to Proceed in Forma Pauperis is attached to the petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States of America -
Fourth Amendment:

Unreasonable searches and seizures: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States of America -
Fifth Amendment:

Criminal actions -- Provisions concerning -- Due process of law and just compensation clauses. -- No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States of America -
Sixth Amendment:

Rights of the accused: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Constitution of the United States of America -
Fourteenth Amendment:

§1 Citizenship -- Due process of law -- Equal protection. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

18 U.S.C. §1952(a) - **Interstate and foreign travel or transportation in aid of racketeering enterprises.**

(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to--

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified to subparagraphs \(1), (2), and (3), shall be found not more than $10,000 or imprisoned for not more than five years, or both.

21 U.S.C. §841(a)(1) - **Prohibited acts A - Unlawful Acts -**

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance, or...

21 U.S.C. §841(b)(1)(B) - **Penalties -**

(b) Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(B) In the case of a violation of subsection (a) of this section involving--

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marihuana plants regardless of weight; or

(viii) 10 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is other than an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marijuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition

to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under the subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

21 U.S.C. §846 - Attempt and conspiracy.

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

USSG 1B1.3(a)(1) - Relevant Conduct (Factors that Determine the Guideline Range)

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter three, shall be determined on the basis of the following:

(1) all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;

USSG 1B1.3(a)(2) - Relevant Conduct (Factors that Determine the Guideline Range)

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter three, shall be determined on the basis of the following:***

(2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction;***

USSG 2D1.1(b)(1) - **Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses).**

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

USSG 2D1.4 - **Attempts and Conspiracies.**

(a) Base Offense Level: If a defendant is convicted of a conspiracy or an attempt to commit any offense involving a controlled substance, the offense level shall be the same as if the object of the conspiracy or attempt had been completed.

USSG 3E1.1 - **Acceptance of Responsibility.**

(a) If the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, reduce the offense level by 2 levels.

(b) A defendant may be given consideration under this section without regard to whether his conviction is based upon a guilty plea or a finding of guilt by the court or jury or the practical certainty of conviction at trial.

(c) A defendant who enters a guilty plea is not entitled to a sentencing reduction under this section as a matter of right.

USSG 4A1.1 - **Criminal History Category**

The total points from items (a) through (f) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

(a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.

(b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).

(c) Add 1 point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this item.

(d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

(e) Add 2 points if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under (a) or (b) or while in imprisonment or escape status on such a sentence. If 2 points are added for item (d), add only 1 point for this item.

(f) Add 1 point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was considered related to another sentence resulting from a conviction of a crime of violence, up to a total of 3 points for this item. Provided that this item does not apply where the sentences are considered related because the offenses occurred on the same occasion.

USSG 4A1.2, comment. (Nov. 1990)

Prior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed.

STATEMENT OF THE CASE AND FACTS

Defendant was charged in a 3 count indictment filed on October 10, 1990 charging him along with Robert Harkins with violations of various federal statutes. (R. 14: Indictment) More specifically he was charged in count one with conspiracy to possess cocaine hydrochloride in violation of 21 U.S.C. Section 846 and 21 U.S.C. Section 841 (b)(1)(B).

In count two Nichols and Harkins were charged with possession of cocaine hydrochloride with an intent to distribute in violation of 21 U.S.C. 846, 841(a)(1), 841(b)(1)(B).

Count three of the indictment charged Nichols and Harkins with traveling in interstate commerce to facilitate an unlawful activity in violation of 18 U.S.C. Section 1952(a) (R. 14, Indictment).

Defendant was rearraigned on December 10, 1990 and entered a plea of guilty to count one of the indictment (R. 21, rearraignment).

On January 9, 1991 his attorney moved to withdraw and this motion was granted on January 10, 1991. (R. 25 & 26). Attorney Bruce Morris entered as his attorney of February 6, 1991 (R. 28) and a judgment proceeding was held on April 1, 1991. (R. 33: minutes to judgment proceeding). The judgment proceeding was continued until April 29, 1991, (R. 37: judgment proceedings) the Court entered judgment sentencing Defendant to a term of imprisonment of 235 months on count one of the indictment and 8

years of supervised release. (R. 37: judgment proceeding). Notice of Appeal was timely filed on May 1, 1991 (R. 42: Notice of Appeal). William B. Mitchell Carter was appointed to represent appellant on appeal.

In early 1990, Kenneth Nichols was contacted by Robert Harkins, the co-defendant in this case. Harkins had worked for Nichols setting up a satellite dish at the Nichols home in Blue Ridge, Georgia. He had known Nichols for about two (2) years according to his testimony. (Tr.: Harkins, 30-33). In April of 1990 Harkins was trying to arrange a drug deal with some "dealers" one of whom was Joe Copeland of the Tennessee Bureau of Investigation and the other D.E.A. Agent Kelly Goodowens. According to Harkins, the price was to be $100,000.00 for 5 kilograms of cocaine. (Tr.: Harkins, 50, 51).

Harkins met the "dealers" in a Cleveland, Tennessee motel. The "dealers" insisted the transaction be made there or at some place other than Northern Georgia. (Tr.: Harkins, Exhibit 2). Harkins said that Nichols was providing the money. He testified he had seen money at Nichol's home but did not count it and did not know if it was $10,000.00, $100,000.00 or what. (Tr.: Harkins, 54).

Harkins admitted to other drug transactions not involving Nichols and to the sale of methamphetamine with these same "dealers" not involving Nichols. (Tr.: Harkins, 86, 87).

On April 8th, Harkins met with the "dealers" in a motel room and discussed the transaction. He testified that he called

Nichols and that after discussing the five (5) kilogram transaction with Nichols he told the "dealers" that "he won't do it". (Tr.: Harkins, 96-101). Harkins explained that Nichols didn't like the way the deal was set up and refused to go through with it. (Tr.: Harkins 101, 102). Harkins engaged in other transactions in April and May not involving Nichols. (Tr.: Harkins, 105, 106).

In September arrangements were made for a purchase of three (3) kilograms for which Nichols was indicted. (Tr.: Harkins, 109). Nichols plea was to a conspiracy in Count one of the indictment which covered the period from September 20 to September 21, 1990.

The agreement was to buy three (3) kilograms of cocaine for $65,000.00. Harkins was to bring $25,000.00 to the motel and get one (1) kilogram of cocaine and take it to Mr. Nichols. If the cocaine checked out, Harkins was to return with the remaining $40,000.00. Harkins says he told Nichols he had a gun in his truck. Nichols denies that he knew about the gun.

In the September transaction, Harkins arrived at the motel, produced $25,000.00 to purchase the drugs and was arrested by the "dealers". (Tr.: Harkins, 67, 68). According to the presentence report on page 4, officers then searched for Nichol's truck. The report indicates he was seen coming out of a wooded area. The police searched the area and found $40,000.00 in currency in a hollow tree stump. A search of his pickup truck revealed a shoulder holster but no weapons. (Tr.: Goodowens, 134, 135).

Nichols was sentenced on the basis of the five (5) kilogram transaction in which he refused to participate in April rather than for the three (3) kilogram transaction in September to which he pled guilty. (Tr. 211). He received two additional points under Sentencing Guidelines 2D1.1(b)(1) for the firearm in Harkins' possession.

At sentencing, appellant's criminal history score was increased one point for a DUI conviction which resulted only in a fine. Nichols indicated that he had been told he did not need an attorney. (Presentence Report page 7, paragraph 22). The District Court found that it could consider and did consider the prior uncounseled misdemeanor (the 1983 DUI) which resulted in no incarceration. (Tr. 186, 187)

The District Court heard testimony concerning previous drug connections by Nichols, much of which evidence had been suppressed by a Georgia Court. (Tr.: Shiflett, 192, 193). The Court denied two (2) points reduction under 3E1.1 of the guidelines for acceptance of responsibility.

REASONS FOR GRANTING THE WRIT

1. TO DETERMINE IF THE DISTRICT COURT SHOULD NOT HAVE CONSIDERED THE DEFENDANT'S PREVIOUS UNCOUNSELED MISDEMEANOR CONVICTION IN COMPUTING DEFENDANT'S CRIMINAL HISTORY SCORE.

The opinion of the majority of the Court allows the use of a prior uncounseled misdemeanor to substantially increase Defendant's sentence. As noted by Judge Jones who dissented from the majority on this issue) the parallels between Baldasar v. Illinois, 446 U.S. 222 (1980) and the present case are substantial. In this case, the Court of Appeals has refused to follow Baldasar under substantially similar facts. Under the sentencing guidelines, prior convictions have substantial impact on sentences. Because of this the importance of the reliability of those sentences is enhanced. We urge that the principles asserted in Baldasar should not be further restricted. This is a case where the holding of Baldasar should have protected the defendant from the use of the uncounseled misdemeanor for the reasons that follow.

The defendant entered a plea of nolo contendere on April 25, 1983, to the charge of Driving Under The Influence, a misdemeanor, in the state court in Florida. He was not represented by counsel in that proceeding, and the record does not reflect that he waived the right to counsel. The Presentence Report listed this offense and the trial judge used the offense in computing the Criminal History score, adding one point.

The commentary at 4.7 in the Criminal History Section notes that consideration of uncounseled convictions may violate the United States Constitution. The commentary at 4.7 states:

"Invalid Convictions."...

> Convictions which the defendant shows to have been constitutionally invalid may not be counted in the criminal history score. Also, if to count an uncounseled misdemeanor conviction would result in the imposition of a sentence of imprisonment under circumstances that would violate the United States Constitution, then such conviction shall not counted in a criminal history score."

In response to this argument, the government contends that the Commentary to the Guidelines was amended in November, 1990. The language provides as follows:

> "Prior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed."
>
> United States Sentencing Guidelines, §4A1.2, comment. (Nov. 1990).

Appellant contends that the November, 1990 addition to the Commentary post-dates the criminal offense in this instant case and therefore should not be applied to this case. However, assuming arguendo that it would apply, the Commentary does not satisfy the substantial constitutional question whether it is consistent with the Sixth Amendment right to counsel to count uncounseled convictions in calculating a defendant's criminal history score.

In Baldasar v. Illinois, 446 U.S. 222 (1980), the United States Supreme Court held that while an uncounseled misdemeanor conviction is constitutionally valid if the defendant is not incarcerated, such a conviction may not be used under an enhanced penalty statute to increase punishment. Although Baldasar dealt with an enhancement statute rather than the Sentencing Guidelines, the logic of the decision is transferable. The Court first noted that pursuant to Gideon v. Wainwright, 372 U.S. 335 (1963) and Argersinger v. Hamlin, 407 U.S. 25 (1972) an accused may not be imprisoned for any offense unless he was represented by counsel. In Baldasar, the defendant had a previous uncounseled misdemeanor conviction which the State used to punish him as a felon under the State enhancement statute. While the Supreme Court recognized that the prior conviction was valid because he did not receive a sentence of incarceration, that did not make the conviction valid "for all purposes". Baldasar, supra, 446 U.S. at 226. Recognizing that the uncounseled prior conviction would form the basis for a sentence of incarceration in the subsequent trial, the Court observed that the incarceration was imposed as a direct consequence of the uncounseled conviction and was therefore invalid under Argersinger.

> "A conviction which is invalid for purposes of imposing a sentence of imprisonment for the offense itself remains invalid for purposes of increasing a term of imprisonment for a subsequent conviction under a repeat-offender statute....a rule that held a conviction invalid for imposing a prison term directly, but valid for imposing a prison

> term collaterally, would be an illogical and unworkable deviation from our previous cases." 446 U.S. at 228-29 (Marshall, Judge, concurring.)

Even prior to Baldasar, the Supreme Court had stated support for the position that uncounseled misdemeanor convictions should not be considered by the sentencing judge. In United States v. Tucker, supra.

Interpreting Tucker, courts have long held that the wide latitude afforded the sentencing judge to consider all information concerning the background, character and conduct of the person convicted was subject to constitutional limitations such as the right to be sentenced only on information which is accurate and the right to have convictions obtained without affording the defendant the benefit of counsel left unconsidered. See, United States v. Lee, 540 F.2d 1205 (4th Cir. 1976), cert. den., 429 U.S. 894. Due process places limitations on the judge's ability to rely on convictions obtained without the benefit of counsel. United States v. Ray, 683 F2d 1116, cert. den., 459 U.S. 1091.

Each of these cases support the position that where a defendant was not afforded counsel and did not knowingly waive the right to counsel, such conviction cannot be used to support sentence enhancement under the Sentencing Guidelines.

Defendant concedes that there is little case law deriving from the application of the Sentencing Guidelines to the Supreme Court's decision in Baldasar. At least one court has held that

the district court may consider during sentencing a criminal defendant's prior uncounseled misdemeanor conviction for which the defendant did not receive a term of imprisonment. See, United States v. Eckford, 910 F.2d 216 (5th Cir. 1990). In Eckford, however, the Fifth Circuit reached its conclusion stating that prior opinions of the court upon which it relied "may not be disturbed except on reconsideration en banc". Further, the decisions upon which the court relied predated the Sentencing Guidelines. See, United States v. Eckford, supra, at 220.

In United States v. Brown, 899 F.2d 677 (7th Cir. 1990), the Seventh Circuit implicitly recognized the need to determine the constitutionality of a prior conviction in order to consider it in determining the defendant's criminal history. In Brown, the District Court considered the question of the constitutionality of the underlying misdemeanor convictions and concluded that the right to counsel had been afforded to defendant and therefore the convictions could be considered. The Seventh Circuit affirmed the District Court's findings of fact regarding the constitutionality of the prior convictions which it need not have done had the constitutionality of the uncounseled misdemeanors been irrelevant.

In the case of United States v. Arigbodi, 924 F.2d 462 (2nd Cir. 1991), the defendant challenged his sentence arguing that his criminal history category was improperly calculated in that the District Court erred in adding points to his criminal history

score for an uncounseled conviction. He claimed that counting a constitutionally invalid conviction violated the Sixth Amendment and was contrary to the intent of the Sentencing Guidelines. Although the November, 1990, Commentary to the Sentencing Guidelines permitted consideration of an uncounseled misdemeanor sentence where imprisonment was not imposed, the Second Circuit recognized that this Commentary still did not address the question whether consideration of uncounseled convictions in calculating a defendant's criminal history would violate the Sixth Amendment right to counsel. Unfortunately, under the facts of Arigbodi, the Seventh Circuit never reached the question. Because the defendant failed to raise the issue in the court below and since the defendant would have received exactly the same sentence in the absence of the alleged erroneous consideration of the uncounseled misdemeanors, the issue was not properly before the court. United States v. Arigbodi, 924 F. 2d at 464. Again, the issue need not have even been identified and considered unless the validity of Baldasar was acknowledged.

Defendant respectfully urges that the Court is permitted to consider almost without limitation all information concerning the background, character and conduct of the defendant to be sentenced. However, implicit in the broad discretion granted the sentencing judge is the necessity that the information be reliable and not bear on such impermissible factors such as race, religion, national origin, or be the result of coerced statements, uncounseled convictions, and the like. United States

v. Torres, 90-5545 (3rd Cir. March 1, 1991). In the case at bar, the uncounseled misdemeanor conviction of the defendant should not be considered by the trial court in the computation of defendant's criminal history score.

In the Sentencing Memorandum filed by the United States in the case, the Government states: "In order to prevail here, defendant Nichols must convince the court that USSG § 4A1.1 and 4A1.2 are unconstitutional." Appellant agrees that this is the situation, and argues that said sections are unconstitutional on the basis before argued. In summary appellant contends:

1. The November 1990 Commentary modification does not apply to appellant in that it post-dated the criminal activity.

2. Under prior decision, it would violate the Sixth Amendment to use a prior uncounseled misdemeanor conviction in computation of the criminal history score.

3. The November 1990 Commentary which would allow the use of uncounseled misdemeanor convictions violates the Sixth Amendment. A Commentary to the Sentencing Guidelines cannot repeal the Constitution.

2. TO DETERMINE WHETHER THE DISTRICT COURT SHOULD NOT HAVE CONSIDERED EVIDENCE WHICH WAS ILLEGALLY SEIZED IN A MARCH 4, 1988, SEARCH.

The Court of Appeals correctly notes that the sentencing guidelines have dramatically changed the calculus of cost and benefits underlying the exclusionary rule. Disputed facts need only be established by the preponderance of the evidence. The 6th Circuit is declining to follow other circuits in allowing the use of illegally seized evidence to be used in considering a defendants offense level under the guidelines. In doing so the 6th Circuit differs from a number of other circuits. See U.S. v. Tejada, 956 F.2d 1256, 1261-62 (2d Cir. 1992); United States v. Lynch, 934 F.2d 1226, 1236-37 (11th Cir. 1991), cert. denied, 112 S. Ct. 885 (1992); United States v. McCrary, 930 F.2d 63, 69 (D.C. Cir. 1991), cert. denied, 112 S.Ct. 885 (1992); United States v. Torres, 926 F.2d 321, 325 (3rd Cir. 1991).

After declining to follow these opinions and thus giving greater right to defendants Fourth Amendment rights, the Court then determined that the Fourth Amendment protection was not to be extended to Nichols because the illegally seized evidence was seized at an earlier time and not during the time of the offense of conviction. In so holding the Court noted that it was troubled that the result may give insufficient weight to the Fourth Amendment rights. Defendant agrees that it gives insufficient weight to those rights and that it has resulted in a greater sentence than he should have received.

The Presentence report noted in paragraph 24, Other Criminal Conduct, that on March 4, 1988, the defendant was arrested by the Rome, Georgia Police Department for Violation of the Georgia Controlled Substances Act, Trafficking in Cocaine, Possession of a Firearm During Commission of a Felony and Possession of a Firearm by a Convicted Felon. The evidence was based mainly on a search of defendant's vehicle. The Superior Court of Floyd County, Georgia, suppressed the evidence seized as a result of the search, and a Georgia Appellate Court upheld the suppression.

Appellant contends that the fact that the cocaine and weapons seized in the March 4, 1988, search were suppressed as evidence would mean that the District Court should not have considered it in sentencing, and used it to sentence the defendant at the top of the guideline range. (The government argued that it should be used to depart upwards, but the judge disagreed.)

The government cited United States v. Tucker, 404 U.S. 443 (1972) for the proposition that the court may conduct an inquiry broad in scope, largely unlimited, either as to the kind of information it may consider, or the source from which it may come. However, Tucker is inappropriate in that it is not a guidelines case and the evidence offered, even though illegally obtained, was not used to enhance a statutory penalty.

Nor is the government's reliance on United States v. Graves well placed. In Graves, 785 F.2d 870, (10th Cir. 1086), a pre-guidelines case, the District Judge was asked not to consider a

"prior record" of possession of marijuana for which the defendant was arrested, but not charged, because it was ruled there was an illegal search and seizure. A second alleged offense was dismissed after the court determined that the search warrant was obtained illegally. While the Tenth Circuit held that the sentencing court was not precluded from considering prior charges that were dismissed or alleged offenses for which charges were not filed because of illegally obtained evidence, this finding may be dicta and unnecessary to the decision in the case in that the District Judge indicated that he would not consider the two alleged offenses in imposing sentence. He merely declined to strike the alleged offenses from the presentence. This was different from the instant case, where the District Judge did use the alleged offenses to sentence at the top of the guideline range. On appeal, the appellant in Graves sought no relief from the sentence imposed by the trial court. The sole contention was that the failure of the District Court to strike from the report the two misdemeanors would unjustly prejudice the handling of the case by the Bureau of Prisons, the Parole Commission and the Probation Department. Therefore, the facts if not the holding in Graves distinguish it from the instant facts.

The Ninth Circuit considered this issue in Verdugo v. United States, 402 F2d 599 (9th Cir. 1968). In Verdugo, the Ninth Circuit was faced with question of the admissibility of drugs obtained in an illegal search. In concluding that the evidence was inadmissible for sentencing purposes, the court looked to

Fourth Circuit authority of Armpriester v. United States, 256 F.2d 294 (4th Cir. 1958), in which a government witness at a presentence hearing testified that after his arrest the defendant had made a statement admitting guilt. The statement was obtained during a period of detention violative of Rule 5(a), Federal Rules of Criminal Procedure, and therefore would have been inadmissible in a trial on the issue of guilt. See, Mallory v. United States, 354 U.S. 449 (1957). The Fourth Circuit held:

> "It is recognized that a court has wider latitude of inquiry in fixing the sentence that during a contest to determine an issue of guilt.
>
> [Citations] Nevertheless, we would not condone the use of evidence in breach of the law, even for the limited purposes of determining the sentence" 256 F.2d at 297.

The Court in Verdugo went on to hold that the evidence considered in sentencing the defendant in that case was in violation of a constitutional prohibition, not merely a rule of procedure.

The exclusionary rule is a part of a constitutional right, not merely a rule of evidence adopted in the exercise of a supervisory power. Consideration of evidence which had been judicially determined to have been illegally seized would be improper.

Appellant acknowledges that at least one appellate court has held that evidence seized in violation of the Fourth Amendment and suppressed for that reason may be considered under the Sentencing Guidelines. United States v. Torres, 90-5545 (3rd

Cir. March 1, 1991). However, Torres is distinguishable in that the Third Circuit held that the sentencing judge had the right to consider all evidence that was part of the "offense conduct" of the defendant for which he was being sentenced. Also in Torres, the defendant and the government entered into a stipulation that the defendant would plead guilty to a cocaine offense and that the applicable sentencing guideline range would be set at 100 - 200 grams, even though the defendant had been arrested in possession of 1,000 grams (one kilogram). The Court recognized that under the guidelines, the quantity of illegal drugs is a particularly important factor in arriving at an appropriate sentence. Section 1B1.3(a)(2) of the Sentencing Guidelines provides that relevant conduct shall be considered in calculating the quantity involved in the offense. Consequently, the sentencing court should consider the actual offense conduct of the defendant. The cases cited in Torres all speak to the consideration by the sentencing court of the drug quantities involved in the conduct for which the defendant was being sentenced, or included in counts of the indictment which were dropped as part of the plea agreement. However, in the instant case, the evidence to be considered relates to an arrest that occurred about 2 1/2 years prior to the offense in this case. Therefore, the holdings in Torres and the cases cited therein provide no support for the proposition that evidence suppressed because of its illegal seizure can be used against this defendant at an unrelated sentencing.

The 6th Circuit in its opinion on this case declines to follow Torres but follows the result in Torres because the arrest was 2 1/2 year prior to the offense of conviction.

In summary, for this Court to find that the District Court properly used the illegally obtained evidence as a basis for raising appellant's sentence to the top of the guideline range, this Court would have to find that the Guidelines permit use of illegally obtained evidence in an unrelated case, and that the use of said illegally obtained evidence for sentencing purposes does not violate the United States Constitution. Appellant contends that neither case is true.

Lastly, the government seems to be arguing that the exclusionary rule is just a technicality that can be side-stepped, and that the District Court should look at what really happened. This overlooks the fact that the question of guilt or innocence was never reached in the Georgia case, since the evidence was excluded.

3. TO DETERMINE WHETHER THE DISTRICT COURT SHOULD NOT HAVE GIVEN DEFENDANT A TWO (2) LEVEL UPWARD ADJUSTMENT UNDER 2D1.1(b)(1).

United States Sentencing Commission Guideline 2D1.1(b)(1) provides as follows:

> "If a dangerous weapon (including a firearm) was possessed during commission of the offense increase by two (2) levels."

It is appellants position that he neither knew nor should have reasonably foreseen that his co-defendant Harkins had a weapon in his possession at the time of the commission of the offense. Harkins testimony was that Nichols was told that there was a gun in his (Harkins) truck. He did not state that Nichols told him to take the weapon with him. (Tr.: Harkins 67). It was Mr. Nichols position as presented by his counsel at the time of the plea that he did not know of the existence of this weapon. (Tr.: Rearraignment Proceedings: 19). The presentence report in paragraph 51 indicated that it had been established that Mr. Harkins possessed a loaded firearm and that Mr. Nichols was aware of it. Appellant contests that he was aware of it. In spite of this position, we must concede that defendant could be held responsible for the act committed by a co-conspirator. In this case, appellant has pled guilty to count one of a conspiracy indictment. Under the doctrine of Pinkerton v. United States, 328 U.S. 640 (1946) a conspirator who participates in the conspiracy is responsible for acts committed by co-conspirators if those acts were "foreseeable". The requirements of the

Pinkerton doctrine are that each conspirator is liable for the criminal acts of his co-conspirator as long as the following conditions were met:

> 1. The substance of offense was committed in furtherance of the conspiracy.
>
> 2. The offenses fell within the unlawful projects;
>
> 3. The offense could reasonable have been foreseen as a natural consequence of the unlawful agreement. U.S. v. Douglas, F.2d. 1472 (9th Circuit 1986).

Appellant insists that he neither knew that his co-defendant had a weapon nor was it reasonably foreseeable under the particular facts of his case that defendant Harkins would have such a weapon.

4. TO DETERMINE WHETHER THE DISTRICT COURT SHOULD NOT HAVE CONSIDERED THE QUANTITY OF DRUGS DISCUSSED IN A PHONE CONVERSATION WHICH DID NOT RESULT IN A DRUG TRANSACTION. THE COURT SHOULD RATHER HAVE SENTENCED DEFENDANT ON THE BASIS OF THE DRUGS ACTUALLY INVOLVED IN THE TRANSACTION IN WHICH APPELLANT PARTICIPATED.

Kenneth Nichols pled guilty to Count one of the indictment. That count alleged a conspiracy occurring over a two day period. His co-defendant Harkins, with whom he participated in this offense of conviction, testified during sentencing hearings as set out above that he had attempted to get Kenneth Nichols to provide funds for a drug transaction some three months previous to the offense of conviction. Harkins discussed the purchase of five (5) kilograms of cocaine for $100,000.00. He said Nichols was to provide the money. As set out above he noted that he did not know how much money Mr. Nichols had. He did see some money but was not able to tell just exactly how much money it was. Harkins was unknowingly dealing with two government agents. They attempted to get Mr. Nichols to engage in a drug transaction in a motel in Cleveland, Tennessee. Under the governments theory of the case, defendant refused to enter into the transaction. Although appellant denies entering into the transaction, even the governments theory of the case is that he refused to participate in this drug sale. It is the governments position that his reason for refusing to enter into the drug sale may be that he feared being apprehended. Therefore their position is that since

he was thinking about such a transaction, he should be sentenced for those thoughts as relevant conduct in spite of the fact that he never carried them out. On page 12 of the presentence report in note 3, the presentence officer quoted 2D1.4 of the United States Sentencing Commission Guidelines. The presentence officer quoted the first half of the application note. The application note provides in its entirety as follows:

> "If the defendant is convicted of conspiracy that includes transactions in controlled substances in addition to those that are the subject of the substantive counts of conviction, each conspiracy transaction shall be included with those of the substantive counts of conviction to determine scale. If the defendant is convicted of an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant did not intend to produce and was not reasonably capable of producing negotiated amount, the Court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing. If the defendant is convicted of conspiracy, see Application note 1 to 1B1.3 (relevant conduct)."

The District Court appears to have found that the conduct some three months previous to the count of conviction was part of the "weight under negotiation in an uncompleted distribution" as set out in application note 1 of 2D1.4. In the present case, as set out in the facts above, the co-defendant Harkins was arrested with the money to purchase one gram of the three grams of cocaine (one-third of the total "weight under negotiation"). We would urge that the language in application note 1 simply means that appellant is responsible for the entire three grams rather than

one gram in spite of the fact that the only money present was for the one gram of cocaine.

The District Court failed to properly apply the second portion of application note 1 which provides that when the court finds defendant did not intend to produce the negotiated amount then a court shall exclude from the guideline calculation the amount that the defendant did not intend to produce. The guidelines do not state or require any particular reason for refusing to enter into the transaction. The important distinction is that even under the government's proof appellant did not enter into the transaction involving the five grams of cocaine. If appellant had changed his ways prior to his commission of the offense of conviction and had abandoned any violations of the law and become a model citizen it would not be appropriate for him to be convicted or sentenced for an offense which he did not commit. Even if he thought seriously about committing an offense, the fact is that he did not commit it. The District Court should therefore have computed his guidelines on the basis of the three grams involved in the offense of conviction. We must concede that an offense for which defendant is not charged can be used as "relevant conduct" under Section 1B1.3(a)(1) of the Sentencing Guidelines. United States v. Robison, 904 F2d 365 (6th Cir. 1990). In order for this conduct to be used as relevant conduct to increase the base offense level, the conduct must be proved by a preponderance of the evidence. United States v. Silverman, 889 F.2d 1531, 1535 (6th

Cir. 1989). We urge that the refusal of Mr. Nichols to enter into the transaction does not rise to the level of proof by "preponderance of the evidence" that he engaged in this conduct.

Finally, appellant urges that to allow sentencing for the five (5) kilogram transaction when he has pled guilty to conduct some three (3) months later, would be a violation of his Fifth Amendment right to be "informed of the nature and cause of the accusation" against him. He would further urge that such action on the part of the District Court violated his right to due process of law as guaranteed to him by the Fifth and Fourteenth Amendments of the United States Constitution. For all of these reasons the Court should sentence appellant on the basis of the three (3) kilogram transaction, the offense of conviction.

5. TO DETERMINE IF THE DEFENDANT SHOULD HAVE BEEN GIVEN A 2 LEVEL REDUCTION FOR ACCEPTANCE OF RESPONSIBILITY UNDER SENTENCING GUIDELINE 3E1.1.

United States Sentencing Commission Guideline 3E1.1 provides as follows:

> <u>Acceptance of responsibility</u>
>
> (a) If defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, reduce the offense level by two (2) levels.
>
> (b) A defendant may be given consideration under this section without regard to whether his conviction is based upon a guilty plea or a finding of guilt by the Court or jury or the practical certainty of conviction at trial.
>
> (c) A defendant who enters a guilty plea is not entitled to a sentencing reduction under this section as a matter of right.

Appellant urges that by voluntarily pleading guilty and saving the Court the expense of trial and by admitting his involvement in the offense for which he pled guilty, that is the conspiracy alleged in count one of the indictment, that he has substantially shown acceptance of responsibility. The District Court appeared to hold that he was not entitled to this because he did not meet any of the considerations found in application 1 under this section. We note that some of these application notes have no particular bearing on this case. For instance, application note 1(a) deals with voluntary termination from the criminal conduct and in this instance he was arrested at the time

the conduct for which he was convicted was occurring. Application note 1(b) provides for voluntary payment of restitution when in fact in this instance there was no restitution involved. Appellant urges that he did provide voluntary and truthful admissions to the authority of his involvement in this offense. It is true that he did not concede to the truthfulness of testimony of Harkins concerning an event which is alleged to have occurred some months earlier.

Application note 3 provides as follows:

> Entry of a plea of guilty prior to the commencement of trial combined with truthful of admission of involvement in the offense and related conduct will constitute significant evidence of acceptance of responsibility for the purposes of this section. However this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance or responsibility.

Appellant urges that he did give truthful and timely admissions of his guilty prior to commencement of trial concerning the offense for which he was convicted.

Appellant urges urge that the evidence of alleged events some three months earlier was not related conduct. He has admitted to the conduct within the time frame of the conspiracy, his offense of conviction. Even under the governments theory of the case which is repudiated by appellant, he did not agree to enter into the drug transaction some three (3) months before the offense of conviction. For this reason we urge that he is entitled to a two (2) level reduction.

CONCLUSION

The writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully Submitted,

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No. 91-5581

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

FEB 16 1993

LEONARD GREEN, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KENNETH O. NICHOLS,

Defendant-Appellant.

ORDER

BEFORE: JONES and NELSON, Circuit Judges; and LIVELY, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green

Leonard Green, Clerk

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 91-5581

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KENNETH O. NICHOLS,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Tennessee

Decided and Filed November 6, 1992

Before: JONES and NELSON, Circuit Judges; and LIVELY, Senior Circuit Judge.

JONES, Circuit Judge, announced the decision of the court and delivered an opinion in all but Part II of which LIVELY, Senior Circuit Judge, joined, and in all but Parts II and III of which NELSON, Circuit Judge, joined. Judge NELSON (pp. 23-31), delivered an opinion in Part I of which Judge LIVELY joined.

NATHANIEL R. JONES, Circuit Judge. Defendant, Kenneth O. Nichols, challenges the sentence imposed under the sentencing guidelines upon his guilty plea to conspiracy to distribute cocaine. A majority of the court has concluded that the sentence must be affirmed. For

reasons stated in Part II of the following opinion, I would vacate Nichols' sentence and remand for resentencing.

I

On March 4, 1988, Georgia law-enforcement officers, acting on a lead from a lawful wiretap of suspected drug dealer David Sledge, observed Nichols sell Sledge three ounces of cocaine in a post office parking lot. Nichols and Sledge were arrested, and the ensuing search of Nichols and his vehicle yielded two ounces of cocaine, four firearms, and almost five thousand dollars.

Nichols was charged and subsequently released on bond by the Georgia state courts. Soon thereafter, Nichols became involved in further cocaine trafficking with Robert Harkins, who occasionally performed various construction jobs for Nichols. It appears that Nichols supplied Harkins with cocaine, while Harkins, in turn, supplied Nichols with firearms.

The conviction forming the basis for the present appeal had its genesis in March of 1990, when a third party contacted Harkins and told him of individuals willing to sell kilogram quantities of cocaine. Unbeknownst to Nichols or Harkins, the suppliers were undercover federal law-enforcement officers. Harkins passed word of the suppliers on to Nichols, who asked Harkins to price the cocaine. Upon learning that the suppliers were asking $20,000 per kilogram, Nichols and Harkins agreed to purchase five kilograms. At some point prior to the transaction, Nichols displayed to Harkins a box full of cash and assured Harkins that he had sufficient funds to complete the transaction. Nichols asked Harkins to meet with the suppliers, apparently so that he could avoid another arrest. Nichols also instructed Harkins to bring one kilogram of cocaine to him for testing before paying for it, then return to the suppliers with the full payment if the cocaine tested positive.

Harkins and the undercover agents met in a motel room in Tennessee to negotiate the purchase of the five kilograms. When the agents refused to allow Harkins to leave with a kilogram for testing without paying for it, Harkins telephoned Nichols, who told him to call off the deal. The transaction was never completed.

Nichols and Harkins met in September of 1990 and agreed to contact the undercover agents again with an eye toward purchasing cocaine. Pursuant to their agreement, Harkins contacted the agents and negotiated a price of $65,000 for three kilograms of cocaine and further agreed that the transfer would take place in Cleveland, Tennessee. This time, Harkins was to purchase one kilogram, take it to Nichols for testing, then assuming it tested positive, return to purchase the remaining two kilograms. Meanwhile, Nichols would remain at a nearby location known only to himself and Harkins.

The purchase date was set for September 21, 1990. Prior to the meeting, when Harkins asked Nichols whether he should carry a firearm, Nichols responded that Harkins should use his discretion. When Harkins arrived at the agreed-upon meeting place, he was arrested. The ensuing search revealed that Harkins carried a loaded firearm.

Unknown to Nichols and Harkins, surveillance officers had observed them meeting together prior to the planned transaction. Approximately fifteen to twenty minutes after Harkins' arrest, officers found Nichols emerging from a wooded area toward his truck, parked nearby. In the woods, agents found $40,000 in cash hidden in a tree stump. A search of Nichols' vehicle revealed a shoulder holster but no firearm. Soon after the arrests, Harkins decided to cooperate with the authorities.

On October 10, 1990, Nichols was charged in a three-count indictment. Count one charged Nichols and Harkins with conspiracy to possess with intent to distribute cocaine, and count two charged them with

attempt to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 841 (1988) (amended Nov. 29, 1990) and 21 U.S.C. § 846 (1988). Count three charged Nichols and Harkins with traveling in interstate commerce to facilitate a drug trafficking offense, in violation of 18 U.S.C. § 1952(a) (1988) (amended Nov. 29, 1990). On December 10, 1990, Nichols pleaded guilty to count one of the indictment.

A presentence report, filed on March 11, 1991, set a sentencing guideline range of 188 to 235 months. Nichols filed numerous objections to the report, and on April 1 and April 29, 1991, the court held hearings to consider Nichols' objections. At the conclusion of the second hearing, the district court announced that it would consider a prior uncounseled misdemeanor conviction in calculating Nichols' criminal-history score. The court further indicated that it would consider evidence that was illegally seized in the course of Nichols' 1988 arrest on state drug charges in determining where, within the recommended guideline range, to sentence Nichols.[1] This timely appeal followed.

II

I first consider Nichols' claim that the district court improperly considered a prior uncounseled misdemeanor conviction in calculating his criminal-history score under the sentencing guidelines. In 1983, Nichols pleaded nolo contendere to driving under the influence of alcohol ("DUI"), a misdemeanor, for which Nichols was fined but not imprisoned. Nichols was not represented by counsel in the DUI proceedings, and the court below found that Nichols did not knowingly waive his right to counsel.

Nichols advances a two-pronged attack against the counting of his DUI conviction. First, Nichols contends that the district court applied the wrong version of the guidelines. Because Nichols was sentenced on April 29,

[1]The district court's opinion is published at 763 F. Supp. 277.

1991, the district court applied the 1990 version of the guidelines, which became effective on November 1, 1990. Nichols argues, however, that the court should have applied the 1989 version of the guidelines, as the 1990 version became effective only after the criminal conduct to which he pleaded guilty. Because Nichols challenges the application of the sentencing guidelines to the undisputed facts, our review is de novo. *United States v. Edgecomb*, 910 F.2d 1309, 1311 (6th Cir. 1990).

In imposing a sentence, the sentencing court is normally required to apply the guidelines in effect on the date of sentencing. *United States v. Jennings*, 945 F.2d 129, 135 n.1 (6th Cir. 1991); *see also* 18 U.S.C. § 3553(a)(4), (5) (1988). Nonetheless, when the guidelines in effect at the time of sentencing provide for a greater term of imprisonment than those in effect at the time of the commission of the crime, ex post facto problems may arise; thus, the court may not impose a sentence in excess of that permitted under the version of the guidelines in effect at the time of the criminal conduct at issue. *United States v. Nagi*, 947 F.2d 211, 213 n.1 (6th Cir. 1991), *cert. denied*, 1992 WL 52132, 52173 (1992).

For purposes of Nichols' present challenge, I believe that any differences between the 1990 version of the guidelines, under which Nichols was sentenced, and the 1989 version, which he argues should have been applied, are irrelevant. The operative provision of the guidelines is section 4A1.2. The commentary to the 1990 version of that section provides that "[c]onvictions for driving while intoxicated or under the influence (and similar offenses by whatever name they are known) are counted." United States Sentencing Commission, *Guidelines Manual* § 4A1.2, comment. (n.5) (Nov. 1990) [hereinafter U.S.S.G.]. The commentary further provides that "[p]rior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed." *Id.* comment. (backg'd). Thus, the commentary instructs the sentencing court to count a prior

uncounseled misdemeanor conviction for DUI in calculating a defendant's criminal history score.

The 1989 version of the guidelines provides, by contrast, that a

> sentence resulting [from] a valid conviction is to be counted in the criminal history score. . . . Also, if to count an uncounseled misdemeanor conviction would result in the imposition of a sentence of imprisonment under circumstances that would violate the United States Constitution, then such conviction shall not be counted in the criminal history score.

Id. comment. (n.6) (Nov. 1989). Thus, the 1989 version of the guidelines requires the court to count a prior uncounseled misdemeanor conviction unless doing so would violate the United States Constitution. If counting the conviction would offend the Constitution, however, nothing in more recent versions of the guidelines would permit a court to ignore this constitutional infirmity. Accordingly, under the 1989 and subsequent versions of the sentencing guidelines, an uncounseled misdemeanor conviction for DUI is to be counted unless doing so would violate the Constitution.

In his second line of attack, Nichols advances precisely such a constitutional claim, and contends that the Sixth Amendment proscribes the use of a prior uncounseled misdemeanor conviction, for which a sentence of imprisonment was not imposed, to enhance the term of imprisonment for a subsequent conviction. Both parties recognize that the right to counsel guaranteed by the Sixth Amendment applies to state felony proceedings through the Fourteenth Amendment, and that the state must provide an indigent defendant with counsel unless the defendant competently and intelligently waives that right. *See Gideon v. Wainwright*, 372 U.S. 335, 340, 342 (1963). In *Burgett v. Texas*, 389 U.S. 109 (1967), the Court held that the Sixth Amendment also prohibited the

use of a prior uncounseled *felony* conviction to enhance a defendant's punishment for a subsequent offense under a state recidivist statute. *See id.* at 115.

In *Argersinger v. Hamlin*, 407 U.S. 25 (1972), the Court extended the Sixth Amendment right to counsel to misdemeanor prosecutions in which the defendant was sentenced to a prison term. *Id.* at 33. Noting that "[t]he assistance of counsel is often a requisite to the very existence of a fair trial," *id.* at 31, the Court observed that the right to counsel is particularly crucial where the deprivation of a person's liberty is at stake and, accordingly, held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial," *id.* at 37; *see also Scott v. Illinois*, 440 U.S. 367, 373 (1979) (limiting right to counsel in misdemeanor cases to those situations where imprisonment is imposed as punishment).

In *Baldasar v. Illinois*, 446 U.S. 222 (1980) (per curiam), the Court addressed whether an uncounseled misdemeanor conviction, for which no term of imprisonment had been imposed, could be used to enhance a defendant's term of imprisonment for a subsequent conviction. *Id.* at 222. Although five Justices agreed, in a brief per curiam, to strike down the use of an uncounseled misdemeanor conviction to convert a subsequent misdemeanor into a felony with a prison term, they did so based on the reasoning of three separate concurrences, none of which garnered the support of all five Justices. *See id.* 224.

Certainly the broadest rationale in *Baldasar* was that of Justice Marshall, in a concurrence joined by Justices Brennan and Stevens. Noting that the Court in *Argersinger* had relied heavily on the premise that an uncounseled conviction is not sufficiently reliable to support a deprivation of liberty, Justice Marshall reasoned that

> [a]n uncounseled conviction does not become more reliable merely because the accused has been validly convicted of a subsequent offense. For this reason, a conviction which is invalid for purposes of imposing a sentence of imprisonment for the offense itself remains invalid for purposes of increasing a term of imprisonment for a subsequent conviction under a repeat-offender statute. . . . [A] rule that held a conviction invalid for imposing a prison term directly, but valid for imposing a prison term collaterally, would be an illogical and unworkable deviation from previous cases.

Id. at 227-29 (Marshall, J., concurring). Justice Stewart, also joined by Justices Brennan and Stevens, held that subjecting a defendant to an increased term of imprisonment solely on the basis of a prior uncounseled misdemeanor conviction violated the constitutional rule of *Scott v. Illinois*. *Id.* at 224 (Stewart, J., concurring). Justice Blackmun provided the critical fifth vote. In his separate concurrence, Justice Blackmun adhered to his dissent in *Scott*, in which he advocated a "bright line" approach which would recognize the right to counsel whenever the offense was punishable by more than six months of imprisonment, regardless of the actual punishment imposed, or whenever the defendant was actually subjected to a term of imprisonment. *Id.* at 229-30 (Blackmun, J., concurring).

Given the diverse rationales supporting *Baldasar*'s result, numerous courts have questioned whether the case expresses *any* single holding and, accordingly, have largely limited *Baldasar* to its facts. *See United States v. Castro-Vega*, 945 F.2d 496, 499-500 (2d Cir. 1991); *United States v. Eckford*, 910 F.2d 216, 218-20 & n.8 (5th Cir. 1990); *Schindler v. Clerk of Circuit Court*, 715 F.2d 341, 344 (7th Cir. 1983), *cert. denied*, 465 U.S. 1068 (1984); *United States v. Robles-Sandoval*, 637 F.2d 692, 693 n.1 (9th Cir.), *cert. denied*, 451 U.S. 941 (1981). While I appreciate the reluctance of these courts to extend *Baldasar*'s reach, I am nevertheless convinced

that even a narrow reading of *Baldasar* proscribes the use of a prior uncounseled misdemeanor conviction to enhance a defendant's sentence upon a subsequent conviction under the sentencing guidelines.

The parallels between *Baldasar* and the instant case are substantial: in both cases the defendant was convicted of a misdemeanor for which no counsel was provided and for which the defendant did not waive the right to counsel; similarly, in both cases the defendant's term of imprisonment upon a subsequent conviction was enhanced based upon the prior uncounseled misdemeanor conviction. I can discern no logical or principled basis upon which to distinguish *Baldasar* from the case at bar. That the sentence enhancement in *Baldasar* resulted under an enhanced penalty statute that converted defendant's misdemeanor into a felony, while the instant case arises under the criminal-history provisions of the sentencing guidelines, is a distinction without a constitutional difference. The right to counsel recognized in *Argersinger* is grounded in the realization that a defendant, unaided by counsel, is simply unequipped to prepare his or her defense, thus making the uncounseled conviction inherently unreliable. *See Argersinger*, 407 U.S. at 31-32. "Left without the aid of counsel [a defendant] may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible." *Powell v. Alabama*, 287 U.S. 45, 69 (1932). This unreliability reaches constitutional magnitude where the conviction results in the deprivation of liberty; whether this deprivation is imposed directly or collaterally is analytically irrelevant. *See State v. Laurick*, 575 A.2d 1340, 1347 (N.J. 1990), *cert. denied*, 111 S. Ct. 429 (1990); *State v. Priest*, 722 P.2d 576, 578-79 (Kan. 1986); *State v. Dowd*, 478 A.2d 671, 678 (Me. 1984). If an uncounseled conviction cannot, consistent with the Sixth Amendment, support a term of imprisonment initially, the existence of a subsequent conviction does not make an increased term of imprisonment based on that conviction constitutionally more palatable. Accordingly, I

conclude that the district court erred in counting Nichols' prior uncounseled misdemeanor conviction in calculating his criminal-history score under the sentencing guidelines. My colleagues on the panel having seen the matter differently, I respectfully dissent from this court's judgment as to the issue discussed in this part of my opinion.

III

Nichols next contends that the district court erred in considering evidence obtained during his 1988 arrest on state drug charges, evidence that the Georgia state courts later suppressed as the product of an illegal seizure. The United States counters that this Court does not have jurisdiction to review Nichols' claim, and that the lower court, in any event, properly considered the evidence.[2]

We begin by reviewing the basis for our jurisdiction. The parties agree that the district court did not rely on the contested evidence in fixing Nichols' offense level, but at most, weighed the evidence in sentencing Nichols at the upper end of his guideline range of 188 to 235 months.[3] The United States argues that a sentence within the applicable guideline range is not appealable. The scope of our jurisdiction in this case is governed by 18 U.S.C. § 3742(a), which provides that a defendant may appeal a sentence imposed under the guidelines if the sentence

[2]The United States also suggests that we refuse to reach this issue on the ground that the challenged evidence did not affect Nichols' sentence. In finding that a preponderance of evidence supported the existence of the 1988 criminal conduct, the district court stated that it could "make this determination without really considering the suppressed . . . evidence." J.A. at 28. The court added, however, that it "may consider this [suppressed] evidence which does lend added ballast to the Court's factual conclusions." *Id.* Despite the ambiguity of this language, we find, for purposes of this appeal, that the court relied upon the suppressed evidence.

[3]As noted below, a district court, when imposing a sentence with a guideline range exceeding twenty-four months, must state "the reason for imposing a sentence at a particular point within the range." 18 U.S.C. § 3553(c)(1) (1988)

> (1) was imposed in violation of law;
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
>
> (3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment . . . than the maximum established in the guideline range . . . .

18 U.S.C. § 3742(a) (1988).

We conclude that § 3742(a)(1) vests this Court with jurisdiction to review Nichols' claim. Nichols contends that the district court's consideration of illegally seized evidence in imposing his sentence violated the Fourth Amendment. Because Nichols contests the constitutionality of his sentence, his challenge is clearly subject to review. *See United States v. Pickett*, 941 F.2d 411, 414 (6th Cir. 1991) (challenge to constitutionality of drug ratio used by sentencing guidelines is may be reviewed under § 3742(a)(1)); *cf. United States v. Hamilton*, 949 F.2d 190, 193 (6th Cir. 1991) (per curiam) (while refusal to depart downward may normally not be reviewed, where refusal is based on district court's legal interpretation of the guidelines, appellate court may review under § 3742(a)(1)). Thus, we proceed to consider the merits of Nichols' claim.[4]

[4]Although the United States cites two cases from this circuit that arguably support the opposite conclusion, both cases are distinguishable. In *United States v. Sawyers*, 902 F.2d 1217 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 2895 (1991), the court opined that, because the defendant's sentence was within the proper guideline range, he was precluded from appealing his sentence under 18 U.S.C. § 3742. *Id.* at 1221 n. 5. Nothing in the opinion, however, suggests that the defendant challenged his sentence on constitutional grounds; moreover, the court proceeded to review the claim and concluded that there was "nothing illegal or improper in the action or comments of the trial judge." *Id.* at 1221. In *United States v. Draper*, 888 F.2d 1100 (6th Cir. 1989), the court expressly held that a sentence within the recommended guideline range "*and otherwise valid*" was not appealable under § 3742. *Id.* at 1105 (emphasis added). On this

Congress has directed that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661 (1988). The sentencing guidelines incorporate this statutory language and instruct the court to consider all such information in sentencing a defendant within the recommended guideline range, "unless otherwise prohibited by law." *See* U.S.S.G. § 1B1.4 (Nov. 1991)[5]; *cf. id.* § 6A1.3(a) (permitting court, in resolving factual disputes, to consider relevant information without regard to its admissibility under the rules of evidence provided the information is sufficiently reliable to support its probable accuracy). While conceding the all-encompassing scope of this statutory and guideline language, Nichols asserts that the district court's reliance on evidence illegally seized during his 1988 arrest violates the exclusionary rule embedded in the Fourth Amendment's proscription on illegal searches and seizures. We agree that the statutory language does not resolve Nichols' constitutional claim; although Congress has considerable latitude in determining the rights of criminal defendants, it may not allocate these rights in a manner offensive to the United States Constitution.

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more narrow basis, the court refused to review the defendant's challenge to the district court's refusal to depart downward in imposing his sentence. *Id.*

Nichols, in contrast to the defendants in *Sawyers* and *Draper*, argues that the district court violated his constitutional rights in sentencing him at the top of the applicable guideline range. If a district court were to sentence a defendant at the top of the recommended guideline range based solely on the defendant's race, it is inconceivable that § 3742 would preclude this court from considering an equal-protection challenge to that sentence. Likewise, because Nichols contends that consideration of the illegally seized evidence violated the Fourth Amendment, we are confident that we may properly review his claim.

[5]All citations, *infra*, to the sentencing guidelines refer to the November, 1991 version of the guidelines.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The exclusionary rule seeks to guarantee the rights secured under the Fourth Amendment by proscribing the use of illegally obtained evidence in criminal proceedings against the victim of the illegal search and seizure. *United States v. Calandra*, 414 U.S. 338, 347 (1974); *see Mapp v. Ohio*, 367 U.S. 643, 657 (1961); *Weeks v. United States*, 232 U.S. 383, 393 (1914). The exclusionary rule is not a personal constitutional right of the aggrieved party; rather, it is a remedial device whose primary purpose is to deter future unlawful police conduct. *Calandra*, 414 U.S. at 347. Because, however, the exclusionary rule provides the principal means through which the guarantees of the Fourth Amendment are enforced, "[s]erious inroads on the exclusionary rule mean, as a practical matter, serious inroads on the fourth amendment." *United States v. Jewel*, 947 F.2d 224, 239 (7th Cir. 1991) (Easterbrook, J., concurring).

In delineating the reach of the exclusionary rule, the Supreme Court has "examined whether the rule's deterrent effect will be achieved, and has weighed the likelihood of such deterrence against the costs of withholding reliable information from the truth-seeking process." *Illinois v. Krull*, 480 U.S. 340, 347 (1987). In general, however, the Court has advanced cautiously in considering claims for extension of the rule. *See, e.g., INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984) (refusing to extend exclusionary rule to civil deportation proceedings); *United States v. Leon*, 468 U.S. 897, 922 (1984) (permitting use of evidence seized pursuant to defective warrant where officer acted in objective good faith); *United States v. Havens*, 446 U.S. 620, 627-28 (1980) (permitting use of illegally seized evidence for impeachment of defendant); *United States v. Janis*, 428 U.S. 433, 454 (1976) (permitting use of evidence illegally seized by state officials to be used in federal civil proceedings); *Calandra*, 414 U.S. at 351-52 (refusing to apply

exclusionary rule to grand jury proceedings). ***But see James v. Illinois***, 493 U.S. 307, 319-20 (1990) (holding that exclusionary rule prohibits use of illegally seized evidence to impeach defense witness other than defendant); ***One 1958 Plymouth Sedan v. Pennsylvania***, 380 U.S. 693, 701-02 (1965) (applying exclusionary rule in proceeding for forfeiture of an article used in violation of criminal law); ***Elkins v. United States***, 364 U.S. 206, 223 (1960) (prohibiting use, in federal criminal proceeding, of evidence illegally seized by state officials).

This circuit has not yet resolved whether the exclusionary rule bars the consideration of illegally seized evidence at sentencing under the sentencing guidelines. A number of circuits have confronted the issue, however, and have held that evidence illegally seized by officers, although inadmissible at trial, may nevertheless be considered in determining a defendant's offense level under the guidelines. *See United States v. Tejada*, 956 F.2d 1256, 1261-62 (2d Cir. 1992); *United States v. Lynch*, 934 F.2d 1226, 1236-37 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 885 (1992); *United States v. McCrory*, 930 F.2d 63, 69 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 885 (1992); *United States v. Torres*, 926 F.2d 321, 325 (3rd Cir. 1991). The United States urges that this Court adopt the broad rule announced in these cases to hold that evidence illegally seized during the investigation or arrest of a defendant for the crime of conviction may be considered at sentencing. After careful consideration, we refuse to follow the rule endorsed by these courts; instead, we conclude that the exclusionary rule bars a sentencing court's reliance on evidence illegally seized during the investigation or arrest of a defendant for the crime of conviction in determining the defendant's sentence under the sentencing guidelines.

This conclusion follows in part from the momentous changes in sentencing wrought by the federal sentencing guidelines. Under pre-guidelines practice, courts exercised virtually unlimited discretion in sentencing defendants within broad statutory maxima and minima.

See United States v. Tucker, 404 U.S. 443, 446-47 (1972). Furthermore, there was no guarantee that evidence not relied upon at trial would play a significant role in the district court's determination of a defendant's sentence. Consequently, law-enforcement officials had little incentive to seize evidence illegally and thereby forfeit its use at trial, merely on the vague hope that the evidence might influence the court at sentencing.

The sentencing guidelines, however, have dramatically changed the calculus of costs and benefits underlying the exclusionary rule. Given the rigid determinacy of the guidelines, state officers can often predict a defendant's sentence quite accurately regardless of the precise allegations of the count or counts upon which the defendant is convicted. Moreover, given that disputed facts at sentencing need only be established by a preponderance of the evidence, *see* U.S.S.G. § 6A1.3, comment.; *United States v. Herrera*, 928 F.2d 769, 774 (6th Cir. 1991), rather than beyond a reasonable doubt, state officers now have the somewhat perverse incentive to rely more heavily on sentencing than trial to establish facts that may be of overriding importance in determining a defendant's length of imprisonment -- for example, the total amount of drugs involved in a criminal scheme. As a result, sentencing has to a significant extent replaced trial as the principal forum for establishing the existence of certain criminal conduct. It therefore follows that excluding illegally seized evidence from trial but permitting its use at sentencing will result in a corresponding decrease in the deterrent effect of the exclusionary rule on unconstitutional law-enforcement practices. As stated by Judge Easterbrook of the United States Court of Appeals for the Seventh Circuit,

> [b]efore November 1987 using illegally seized evidence in sentencing could not have been called a serious inroad on the exclusionary rule. Judges based their sentences on the crimes the prosecutor had proved plus the character of the defendant. To get a steep sentence the prosecutor needed to

> obtain a conviction on one very serious charge or multiple less serious ones. Excluding the evidence from the case in chief was a grievous, often mortal, blow. Today prosecutors often present at trial only a small fraction of the defendant's provable conduct. The rest is reserved for sentencing. . . . Where once courts sentenced the offender and not the conduct, now courts sentence for crimes that were the subject of neither charge nor conviction. In proving such additional crimes, illegally seized evidence may play a central role--the same sort of role it used to play in supporting convictions on additional counts.

Jewel, 947 F.2d at 239-40 (Easterbrook, J., concurring).[6]

Notwithstanding our objection to a sentencing court's considering evidence illegally seized during the investigation or arrest of the defendant for the crime of conviction, this case presents a somewhat different scenario, one that we believe tips the balance, however slightly, in the prosecution's favor. The evidence to which Nichols objects, seized during his arrest in 1988 on state drug charges, involved conduct unrelated to that for which Nichols was convicted in this case. We base this characterization on the fact that the events surrounding Nichols' 1988 arrest were so remote as to not fall within the sentencing guidelines' relevant conduct provisions.

[6]Judge Silberman of the United States Court of Appeals for the District of Columbia Circuit has made similar observations:

> If the police and prosecution know beforehand that they can get a conviction on a relatively minor offense which has a broad statutory sentencing range and that they can guarantee a sentence near the maximum by seizing other evidence illegally and introducing it at sentencing, there is nothing to deter them from seizing the evidence immediately without obtaining a warrant, especially when a conviction on a "greater" crime would lead to a similar sentence.

McCrory, 930 F.2d at 71 (Silberman, J., concurring).

See U.S.S.G. § 1B1.3.[7] Given the discrete nature of the two arrests and the conduct on which they were based, we conclude that excluding the evidence from sentencing on the subsequent conviction would not sufficiently further the purposes of the exclusionary rule to justify barring its use at sentencing. As stated above, the exclusionary rule seeks to deter police conduct that violates the Fourth Amendment. A rule prohibiting the consideration of illegally seized evidence during the sentencing phase of a conviction on a subsequent and unrelated crime arguably would provide only limited deterrence to unconstitutional law-enforcement practices. Application of the exclusionary rule to the facts of this case would necessarily require the inference that, absent the rule, police would have an incentive to seize evidence illegally *solely* on the expectation that the evidence might be used in sentencing the defendant for a subsequent crime. Given the prophylactic purpose of the exclusionary rule, as well as the Supreme Court's overly restrictive interpretation of the rule, we find ourselves obliged to conclude that such an inference is simply too frail to support application of the exclusionary rule in this instance. Although we are troubled that the result we reach today may give insufficient weight to the valuable rights enshrined in the Fourth Amendment, we nevertheless feel compelled to hold that, where evidence is illegally seized in relation to conduct that does not fall within the relevant conduct provisions of the sentencing guidelines, and the district court does not otherwise rely on the evidence in determining the defendant's sentence, the court may consider such evidence in determining where to sentence the defendant within the recommended guideline range.[8]

[7]We also note that the district court did not consider Nichols' 1988 arrest and the ensuing state court proceedings to adjust his criminal-history score pursuant to U.S.S.G. § 4A1.3(d) or (e).

[8]Given our conclusion that the district court did not err in considering the challenged evidence, we need not address the contention, advanced by the United States, that the evidence was, in fact, legally seized.

IV

Nichols next challenges the district court's decision to increase his offense level by two levels for possession of a firearm, pursuant to section 2D1.1(b)(1) of the guidelines. *See* U.S.S.G. § 2D1.1(b)(1). Nichols pleaded guilty to conspiracy to possess cocaine with intent to distribute, an offense punishable under guidelines' section 2D1.4. *See id.* § 2D1.4. That section incorporates by reference section 2D1.1, *see id.* comment. (n.3), which provides that "[i]f a dangerous weapon (including a firearm) was possessed, increase by 2 levels," *id.* § 2D1.1(b)(1). This court has consistently held that possession of a firearm under section 2D1.1(b)(1) "is attributable to a co-conspirator not present at the commission of the offense as long as it constitutes reasonably foreseeable conduct." *United States v. Williams*, 894 F.2d 208, 211 (6th Cir. 1990); *accord United States v. Tisdale*, 952 F.2d 934, 938 (6th Cir. 1992) (citing *Pinkerton v. United States*, 328 U.S. 640 (1946)).

Although Nichols concedes that his coconspirator, Harkins, possessed a firearm during the commission of the offense, he insists that Harkins' decision to carry a firearm to the drug transaction was not reasonably foreseeable. Harkins, however, offered undisputed testimony that he asked Nichols immediately prior to the deal whether he should carry a gun with him, and that Nichols advised him to do whatever he wished. The evidence also indicated that Nichols purchased a number of firearms from Harkins in the months preceding his arrest, and that these firearms were linked to Nichols' and Harkins' drug trafficking activities. While this evidence might be insufficient to establish actual knowledge, section 2D1.1 does not demand *scienter*. Harkins' testimony was sufficient to support the court's finding that Harkins' firearm possession was reasonably foreseeable; the sentencing guidelines demand no more. Because a preponderance of the evidence supported the district court's findings in this regard, we affirm the increase in

Nichols' sentence for possession of a firearm during the commission of the offense.

V

Nichols also claims that the district court erred in counting five kilograms of cocaine involved in a prior, uncompleted transaction in setting his base offense level. As set out in Part I, *supra*, Harkins first came into contact with undercover law-enforcement agents concerning a possible cocaine deal in early 1990. After Harkins priced the cocaine at $20,000 per kilogram, he and Nichols agreed to attempt to purchase five kilograms from the agents for $100,000. Prior to the deal, Nichols displayed a large amount of cash to Harkins and alleged that it was enough to cover the deal. When the agents refused to allow Harkins to take one kilogram to Nichols for testing without paying for it, Harkins telephoned Nichols, who told Harkins to call off the deal. In September of 1990, Nichols and Harkins agreed to recontact the agents. Their attempt, at that time, to purchase three kilograms of cocaine from the agents formed the basis for the present conviction.

Section 1B1.3(a) of the guidelines provides that the base offense level "shall be determined on the basis of . . . (2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a), (a)(2); *see also id.* § 3D1.2(d) (requiring grouping of counts "[w]hen the offense level is determined largely on the basis of," *inter alia*, "the quantity of a substance involved"). The commentary to section 1B1.3 clarifies that, "in a drug distribution case, quantities and types of drugs not specified in the count of conviction are to be included in determining the offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction." U.S.S.G. § 1B1.3, comment. (backg'd); *see also id.* § 2D1.1, comment. (n.12) ("Types

and quantities of drugs not specified in the count of conviction may be considered in determining the offense level."); *United States v. Miller*, 910 F.2d 1321, 1326-27 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 980 (1991). The operative provision in this case is section 2D1.4, which provides, in relevant part, as follows:

> If the defendant is convicted of an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing.

U.S.S.G. § 2D1.4, comment. (n.1). The district court determined that the earlier transaction constituted relevant conduct for which Nichols was accountable under the guidelines. We review a district court's determination that conduct is relevant to the offense of conviction for clear error. *See United States v. Silverman*, 889 F.2d 1531, 1539 (6th Cir. 1989).

Nichols raises two challenges to the district court's decision. First, Nichols argues that the earlier transaction, occurring approximately three months prior to the transaction underlying his conviction, cannot be construed as "part of the same course of conduct or common scheme or plan" as the subsequent transaction that was interrupted by his and Harkins' arrest. We disagree. In *Miller*, we upheld the district court's reliance on drug quantities involved in a conspiracy spanning twenty months in setting the defendant's offense level, despite the fact that the count of conviction alleged a conspiracy extending over only three months. 910 F.2d at 1327. In affirming the court's finding that the uncharged distributions constituted relevant conduct, we

noted that the sentencing guidelines require that "the entire quantity of cocaine attributable to a distribution enterprise must be used to establish the base offense level of a conspirator in the undertaking." *Id.*; *see also United States v. Hodges*, 935 F.2d 766, 772 (6th Cir.) (holding that district court must consider all drug quantities sold during the lifetime of the conspiracy), *cert. denied*, 112 S. Ct. 251, 317 (1991). In the instant case, the disputed transaction involved the same parties (Harkins and Nichols), the same substance (cocaine), and the same objectives (the purchase of kilogram quantities of cocaine) as the transaction for which Nichols was convicted. On these facts, the district court's conclusion that the earlier transaction was part of the same course of conduct as the subsequent transaction was not clearly erroneous.

Nichols also contends that the earlier transaction should not be counted because he decided to call off the deal prior to its consummation. The commentary to section 2D1.4, however, makes clear that an amount involved in an earlier transaction should be counted unless "the defendant did not intend to produce *and* was not reasonably capable of producing the negotiated amount." U.S.S.G. § 2D1.4, comment. (n.1) (emphasis added); *see also United States v. Gonzales*, 929 F.2d 213, 216 (6th Cir. 1991) (under section 2D1.4, "'the amount of the drug being negotiated, even in an uncompleted distribution, shall be used to calculate the total amount in order to determine the base level'") (quoting *United States v. Perez*, 871 F.2d 45, 48 (6th Cir.), *cert. denied*, 492 U.S. 910 (1989)). Nichols arranged with Harkins to purchase, and clearly intended to purchase, five kilograms of cocaine from the undercover agents. His goal was frustrated only when the agents refused to allow Harkins to leave with one kilogram for testing without paying for it. Moreover, Nichols' representation to Harkins that he had enough cash to purchase the cocaine supports the conclusion that Nichols was capable of producing the funds for the negotiated amount. Accordingly, we are satisfied that the district court's determination that the earlier transaction constituted relevant conduct was not

clearly erroneous. Nichols' remaining objections to the relevant conduct provisions are without merit.

VI

As a final matter, Nichols maintains that the district court erred in refusing to grant him a two-level reduction under section 3E1.1 of the guidelines for acceptance of responsibility. A reduction under section 3E1.1 is proper "[i]f the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct." U.S.S.G. § 3E1.1(a). Acceptance of responsibility is a factual determination left to the sound discretion of the district court, and the court's determination on this issue is not to be disturbed unless clearly erroneous. *United States v. Williams*, 940 F.2d 176, 181 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 666 (1991).

At the sentencing hearing, Nichols denied involvement in Harkins' attempt to purchase the five kilograms of cocaine in the Spring of 1990, despite persuasive evidence to the contrary. On that basis, the district court concluded that Nichols' admission of guilt was "less than complete." J.A. at 254. Upon review, we find nothing in the record to suggest that the district court's determination was clearly erroneous.

VII

The sentence imposed by the district court is **AFFIRMED**.

DAVID A. NELSON, Circuit Judge, concurring in judgment. In Part II of his opinion, Judge Jones presents a very cogent explanation of his reasons for thinking that our sister circuits have erred in failing to read *Baldasar v. Illinois*, 446 U.S. 222 (1980), as proscribing the use, for Sentencing Guidelines purposes, of prior "uncounseled" misdemeanor convictions not resulting in incarceration. It seems to me, however, that Judge Jones' real quarrel is not with the other circuits for misreading *Baldasar*, but with Justice Blackmun for not joining Justices Brennan and Stevens in concurring with Justice Marshall.

Because the rationale of the separate opinion filed by Justice Marshall was not endorsed by a majority of the justices, I believe that the reading which the other courts of appeals have given the *Baldasar* decision is correct. I am authorized to state that Judge Lively agrees, and Part I of the following opinion thus represents the opinion of the court on this issue.

I

The precise question presented to the Supreme Court in *Baldasar* was whether the misdemeanor conviction of an offender who did not have a lawyer and who was not incarcerated "may be used *under an enhanced penalty statute* to convert a *subsequent misdemeanor* into a *felony* with a prison term." 446 U.S. at 222 (emphasis supplied).

Four members of the Supreme Court concluded that such a conviction may be used to convert a subsequent misdemeanor into a felony, while five members of the Court concluded that it may not be so used. If all five members of the majority had concurred in the reasoning set forth by Justice Marshall in his separate opinion, the logic of *Baldasar* might require us to hold, in the case at bar, that defendant Nichols' "uncounseled" DUI

conviction[1] could not be used in determining the sentence for his felony cocaine conviction. The problem, of course, is that Justice Marshall's reasoning did not command the support of a majority of the court -- and the "reach" that *Baldasar* has as a precedent obviously depends on the reasoning that led each member of the majority to vote to reverse the judgment of the lower court.

Justice Blackmun, who provided the critical fifth vote in favor of reversal, made it very clear why he voted as he did: adhering to the view expressed in his dissent in *Scott v. Illinois*, 440 U.S. 367, 389-90 (1979), Justice Blackmun felt that because Mr. Baldasar's prior misdemeanor was punishable by more than six months' imprisonment, and because Baldasar was not represented by an attorney at the time of his conviction, the conviction was simply "invalid." Being invalid, in Justice Blackmun's view, the conviction "may not be used to support enhancement." *Baldasar*, 446 U.S. at 230 (separate concurrence of Blackmun, J.) This is Justice Blackmun's only stated reason for concurring in the Court's decision to reverse.

Unlike Justices of the Supreme Court, the members of this court are not free to pick and choose among Supreme Court precedents, following those they like and rejecting those they do not like. Supreme Court precedent that is binding on this court requires that we treat defendant Nichols' DUI conviction as constitutionally valid. *Scott v. Illinois*, 440 U.S. 367 (1979). And because the DUI

[1]In point of fact, Mr. Nichols may well have waived his right to counsel in the DUI proceeding; he told the probation officer who prepared the presentence report here "that he had contacted an attorney and had been informed by that attorney that he did not need to be represented at the hearing, since he would be pleading nolo contendere." Stating that "[t]he proof is unclear as to whether he may have validly waived his right to counsel," the district court determined, on the basis of the facts before it, that there was no valid waiver. *United States v. Nichols*, 763 F.Supp. 277, 278 (E.D. Tenn. 1991). I do not question the propriety of this determination as a legal matter, but would note that it may be incorrect as a factual matter.

conviction was valid, it can be used for any legitimate purpose -- including sentence enhancement -- as far as the logic of Justice Blackmun's opinion is concerned.

Our own court, indeed, has held that "evidence of prior uncounselled misdemeanor convictions for which imprisonment was not imposed [ ] may be used for impeachment purposes." *Charles v. Foltz*, 741 F.2d 834, 837 (6th Cir. 1984), *cert. denied*, 469 U.S. 1193 (1985), citing *Wilson v. Estelle*, 625 F.2d 1158, 1159 (5th Cir. 1980), *cert. denied*, 451 U.S. 912 (1981). If defendant Nichols had chosen to go before a jury on the felony drug charges, therefore, *Charles v. Foltz* shows that the jury could have considered his prior DUI conviction in determining whether Mr. Nichols was guilty or innocent. That being so, it strikes me as anomalous, to say the least, that a judge should not be allowed to consider the prior DUI conviction in determining what sentence to impose once guilt has been established.

The anomaly comes into sharper focus, perhaps, when we observe that the statute governing the case at bar makes it mandatory that the sentencing court impose "a term of imprisonment which may not be less than 10 years and *not more than life* . . . ." 21 U.S.C. § 841(b)(1)(B) (emphasis supplied). In *Baldasar*, as Justice Marshall was careful to point out, "[t]he sentence [Mr. Baldasar] actually received would not have been authorized by statute but for the previous conviction." 446 U.S. at 227. In the present case, by contrast, a sentence of up to life imprisonment would have been authorized by statute whether or not there was a previous DUI conviction in defendant Nichols' record.[2]

[2]Under the Sentencing Guidelines, it is true, the sentencing court could not have imposed a sentence outside a range of 168-210 months, absent the DUI conviction, unless the court made findings sufficient to support a "departure" under 18 U.S.C. 3553(b). Examination of the record in this case suggests that such a departure might well have been warranted.

In *Wilson v. Estelle* (the Fifth Circuit decision that was followed by our court in *Charles v. Foltz*) the Fifth Circuit expressed itself as follows:

> "We find no error in the admission of the evidence as to Wilson's prior [uncounseled] misdemeanor conviction . . . . For this conviction Wilson was not imprisoned. It is well settled that the Sixth and Fourteenth Amendments do not require the state to afford counsel to an indigent criminal defendant in those misdemeanor cases in which the offender is not imprisoned. *Scott v. Illinois*, 440 U.S. 367, 373-74, 99 S. Ct. 1158, 1162-1163, 59 L.Ed.2d 383, 388-389 (1979). Furthermore, this court in *Griffin v. Blackburn*, 594 F.2d 1044 (5th Cir. 1979) held that evidence of prior uncounseled misdemeanor convictions for which imprisonment was not imposed may be used for impeachment purposes and opened the door for other uses of such evidence as well:
>
> > Logically, if a conviction is valid for purposes of imposing its own pains and penalties -- the 'worst' case -- it is valid for all purposes.
>
> 594 F.2d at 1046. [Footnote ("But *cf. Baldasar v. Illinois* . . . .") omitted.] We see no compelling reason for placing a special exclusion on the introduction of such evidence at the punishment stage of a trial." *Wilson v. Estelle*, 625 F.2d at 1159.

The logic employed by the Fifth Circuit in *Wilson v. Estelle* and by this court in *Charles v. Foltz* would seem to compel the conclusion that a prior uncounseled misdemeanor conviction that did not result in imprisonment may be used in calculating a defendant's criminal history category under the Sentencing Guidelines. And that is exactly the conclusion reached by the Fifth Circuit in *United States v. Eckford*, 910 F.2d 216 (5th Cir. 1990). Recognizing that it was "bound by prior Circuit precedent," *id.* at 217, the court there affirmed a sentence at the top of a guideline range determined by reference to two prior uncounseled misdemeanor convictions that had not resulted in imprisonment. Following *Wilson v. Estelle*, and notwithstanding *Baldasar*, the *Eckford* court made these observations:

> "The inconsistency between Justice Blackmun's narrow approach and Justice Marshall's expansive approach has clouded the scope of the *Baldasar* decision. Many courts have questioned whether *Baldasar* expresses *any* persuasive authority on the collateral use of uncounseled misdemeanor convictions. *See, e.g., Schindler v. Clerk of Circuit Court*, 715 F.2d 341, 345 (7th Cir. 1983) ('the [*Baldasar*] decision provides little guidance outside of the precise factual context in which it arose.'), *cert. denied*, 465 U.S. 1068, 104 S. Ct. 1419, 79 L.Ed.2d 745 (1984); *United States v. Robles-Sandoval*, 637 F.2d 692, 693 n. 1 (9th Cir.) ('The court in *Baldasar* divided in such a way that no rule can be said to have resulted.'), *cert. denied*, 451 U.S. 941, 101 S. Ct. 2025, 68 L.Ed.2d 330 (1981)." *United States v. Eckford*, 910 F.2d at 219 (footnotes omitted).

In *Wilson v. Estelle*, the Fifth Circuit explained, *Baldasar* had "essentially [been] limited . . . to its particular factual scenario: 'a prior uncounseled misdemeanor conviction may not [be] used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony with a prison term.'" *Eckford*, 910 F.2d at 220, quoting *Wilson v. Estelle*, 625 F.2d at 1159 n.1. The *Eckford* court went on to observe that subsequent opinions had reinforced *Wilson*:

> "In *Thompson v. Estelle*, 642 F.2d 996 (5th Cir. Unit A 1981), we again concluded that 'evidence of a prior uncounselled misdemeanor conviction

> for which no imprisonment was imposed may properly be introduced in the punishment phase of a trial.' *Id.* at 998. In *United States v. Smith*, 844 F.2d 203 (5th Cir. 1988), we held that a sentencing court could consider the defendant's numerous prior uncounseled convictions, none of which resulted in imprisonment." *Eckford*, 910 F.2d at 220.

"[I]n the absence of reconsideration en banc," *Eckford* concluded, "this Court is not empowered to disturb our prior reasoned decisions that *Baldasar v. Illinois* does not preclude the use of uncounseled misdemeanor convictions during sentencing for a subsequent criminal offense." *Id.* (footnote omitted).

In *United States v. Castro-Vega*, 945 F.2d 496 (2d Cir. 1991), *petition for cert. filed* (Jan. 1992), similarly, the Court of Appeals for the Second Circuit -- which apparently had no prior precedents comparable to *Wilson v. Estelle* or our own *Charles v. Foltz* decision -- held, in a carefully reasoned opinion, that it is not unconstitutional to count prior uncounseled misdemeanor convictions with no incarceration in calculating a defendant's criminal history category under the Sentencing Guidelines. The Second Circuit noted that the Sentencing Commission, in its Background Comment on Guideline § 4A1.2 (1990 ed.), had stated explicitly that "[p]rior sentences, not otherwise excluded, are to be counted in the criminal history score, *including uncounseled misdemeanor sentences where imprisonment was not imposed.*" 945 F.2d at 499 (emphasis added by the Second Circuit).[3] Analyzing *Baldasar* in the same

[3]As originally proposed by the Sentencing Commission, the Comment would have stated explicitly that "[t]he Commission does not believe the inclusion of sentences resulting from constitutionally valid, uncounseled misdemeanor convictions in the criminal history score is foreclosed by *Baldasar v. Illinois*, 446 U.S. 222 (1980)." 55 Fed.Reg. 5718, 5741 (Feb. 16, 1990). The reference to *Baldasar* was dropped in the final version of the Comment, but that version obviously could not have been adopted without adherence to the view expressed in the Federal Register notice.

way the Fifth Circuit and others had done earlier, the Second Circuit found that "no common denominator . . . upon which all of the Justices in the *Baldasar* majority agreed" could be considered applicable in the case before it. 945 F.2d at 499-500.

In further explanation of its holding that prior uncounseled misdemeanor convictions may be used in the manner directed by the Sentencing Guidelines, the Second Circuit said this:

> "The problem posed in this case -- calculating a defendant's criminal history by relying in part on a prior uncounseled misdemeanor conviction -- is different from the situation in *Baldasar*. In *Baldasar*, the defendant's prior conviction materially altered the substantive offense for which he could be held criminally responsible by converting it from a misdemeanor to a felony with a prison term -- an offense that on its own would trigger a right to counsel. In the instant case, the court used an uncounseled misdemeanor conviction to determine the appropriate criminal history category for a crime that was already a felony. *See id.*
>
> * * *
>
> In the absence of any clear direction from the Supreme Court, and given the narrowness of the *Baldasar* holding, we decline to extend *Baldasar* to this case." 945 F.2d at 500.

Agreeing with the conclusion reached by our sister circuits -- a conclusion that is logically compelled, as I see it, by our own prior holding in *Charles v. Foltz* -- I would affirm the judgment of the district court insofar as the use of defendant Nichols' "uncounseled" DUI conviction is concerned.

II

Although I agree with the conclusion of my colleagues that the district court did not err in considering the evidence which the state police officers found in defendant Nichols' pickup truck and on his person -- evidence consisting of cocaine, loaded weapons, false-bottom oil cans, and $2,800 in cash -- I prefer not to join in some of the *dicta* that accompany the court's announcement of this conclusion. Our disposition of this appeal makes it unnecessary to say, for example, whether we agree or disagree with the "broad rule" that other Courts of Appeals have adopted with respect to the use at sentencing of evidence inadmissible at trial.[4] And whatever our individual views may be on the merits of the "interpretation" of the exclusionary rule that the Supreme Court has fashioned over the past four decades, the Court clearly does not view its rule as being "embedded" in the Fourth Amendment's proscription of unreasonable searches and seizures. See, *e.g.*, *United States v. Calandra*, 414 U.S. 338, 348 (1974) (the exclusionary rule "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved"); *United States v. Janis*, 428 U.S. 433, 459 (1976); *Elkins v. United States*, 364 U.S. 206, 216-17 (1960). For these reasons, among others, I do not

[4]Courts that have been required to decide this issue have usually been careful not to address issues not raised by the facts of the case before them. In *United States v. Lynch*, 934 F.2d 1226, 1237 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 885 (1992), for example, where a panel consisting of Justice Powell, Chief Judge Tjoflat and Judge Kravitch "decline[d] to extend the exclusionary rule to sentencing proceedings," Chief Judge Tjoflat's opinion added this note:

> "We do not address -- because the facts of this case do not raise the issue -- whether the exclusionary rule should apply in sentencing proceedings to evidence unconstitutionally seized solely to enhance the defendant's sentence. *See Verdugo v. United States*, 402 F.2d 599, 610-13 (9th Cir. 1968), *cert. denied*, 402 U.S. 961, 91 S. Ct. 1623, 29 L.Ed.2d 124 (1971). In that situation, it may be that the exclusionary rule's rationale can be served only by excluding the illegally seized evidence from consideration at sentencing." *Lynch*, 934 F.2d at 1237 n.15.

concur in Part III of Judge Jones' opinion. I do concur in Parts I, IV, V, and VI.

Number _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

KENNETH O. NICHOLS

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

PROOF OF SERVICE

STATE OF TENNESSEE

COUNTY OF HAMILTON

William B. Mitchell Carter, after being duly sworn, deposes and says that pursuant to Rule 28.4(a) of this Court he served the within MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT on counsel for the Respondent by enclosing a copy thereof in an envelope, first-class postage prepaid, addressed to:

Steven H. Cook
Assistant United States Attorney
Post Office Box 872
Knoxville, Tennessee 37901

Solicitor General
Department of Justice
Washington, DC 20530

and depositing same in the United States mail at Chattanooga, Tennessee on this the 19th day of April, 1993.

William B. Mitchell Carter
WILLIAM B. MITCHELL CARTER

Sworn to and subscribed before me
this 19th day of April, 1993.

Trudi C. Eddings
NOTARY PUBLIC

My Commission expires: 6-22-94